

August 14, 2009

The Honorable George H. Bunting, Jr.
Senate, State of Delaware
Legislative Hall
Dover, DE 19903

Re: State Employment of Members of the General Assembly

Dear Senator Bunting,

You requested an Attorney General's opinion as to whether members of the General Assembly may be employed by the State. Having reviewed the Delaware Constitution, relevant case law and state statutes, it is our opinion that the only legal obstacle to State employment of members of the General Assembly is the Constitutional prohibition against legislators holding a "civil office" that has been created, or for which the compensation has been increased, during the legislator's term of office, and against persons "holding office under this State" from serving in the General Assembly. *Del. Const.* art. II, § 14.

The Delaware Supreme Court has given the opinion that any statute prohibiting State employment of legislators is unconstitutional if it prohibits more than just holding "civil office." *Opinion of the Justices*, 245 A.2d 172 (Del. 1968). "Civil office" means something more than "mere public employment." *Id.* at 174 n.2 (internal quotation marks omitted). It is characterized by a number of elements, which include,

- (1) the exercise of some portion of the State's sovereign power,
- (2) tenure in office, (3) fees and emoluments, . . . (4) oaths of office, . . . and a fifth characteristic: The powers and duties of [the] position are conferred and defined by law.

Opinion of the Justices, 722 A.2d 307, 311 (Del. 1998).

Your request for an Attorney General's opinion expressed concern about possible conflicts of interest, particularly in matters of budget approval. The State Employees', Officers'

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and Officials' Code of Conduct, 29 *Del. C.* ch. 58, which prohibits state employees from holding positions that might result in a conflict of interest, does not apply to the General Assembly. 29 *Del. C.* § 5804(12)b.1. Indeed, under the authority of the 1968 *Opinion of the Justices, supra*, any statute that imposed any disqualification on members of the General Assembly beyond the constitutional disqualifications in art. II, § 14, would itself be unconstitutional.

In conclusion, the Delaware Constitution sets forth the qualifications and disqualifications for state legislators. Ordinary public employment is not a disqualification, nor can it be without amending the Constitution.

Very truly yours,

Jennifer D. Oliva
Deputy State Solicitor

cc: Lawrence Lewis, State Solicitor